Supreme Court, U.S.
FILED
JAN 2 0 2004
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No. 03-95

IN THE

Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 20, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, economic sector, and geographic region of the country. An important function of the Chamber is to represent the interests of its members in litigation raising issues of widespread concern to the

[1] Under this Court's Rule 37.6, amicus states that no counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, including numerous employment discrimination cases. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002).

The Chamber fully endorses the need to afford protection for plaintiffs seeking redress for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Following this Court's decisions in *Faragher* and *Ellerth* (as well as the earlier decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)), employers have made great strides in training managers and co-workers in what constitutes appropriate conduct, implementing zero-tolerance policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace.[2] By recognizing an affirmative defense to strict employer liability for companies that adopt pro-active training and remedial action,[3] this Court set in motion important behavioral incentives, for both companies and potential victim employees, that have had an enormously

[2] The anti-harassment policies and practices of leading companies, including JP Morgan Chase, Atlantic Richfield, the Segal Company, and Credit Suisse First Boston, are described in Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference on Labor (S. Estreicher ed., Kluwer Law International, 1999).

[3] An affirmative defense to hostile work environment liability exists where the employer (1) "exercise(s) reasonable care to prevent and correct promptly any sexually harassing behavior," and where the plaintiff (2) "unreasonably failed to take advantage of any preventive corrective opportunities provided by the employ[er] or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

beneficial influence in fostering a supportive, non-harassing workplace culture for women, racial and ethnic minorities, and indeed all Americans.

The Court in *Faragher* and *Ellerth*, of course, ruled that this affirmative defense would not be available when one or more supervisors have taken a "tangible employment action" against the complaining employee. This critical term, although not defined, was not an open-ended invitation to judicial creativity, for the Court made clear that it had in mind decisions, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. What these actions all have in common is that they involve "company act[s]," where the company as an entity must act to effect the decision, and hence it is reasonable to presume that notice to the company must or should have preceded the decision. *Ellerth*, 524 U.S. at 762 ("A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.").

The court of appeals' decision in this case, however, threatens to undermine the incentives provided by *Faragher* and *Ellerth*. It broadens the concept of tangible employment action to include employee resignations that a court later characterizes as a "constructive discharge." But a constructive discharge is simply a legal construct for treating a resignation as a discharge for the limited purpose of allowing the plaintiff to argue that his or her resignation should not be treated as a wholly voluntary act. A resignation, whether or not it is later labeled a constructive discharge, cannot be treated as a tangible employment action within the meaning of *Faragher* and *Ellerth*. A resignation does not involve a company act that reasonably puts the company on notice of a

potential claim or possible supervisor misconduct. In such circumstances, it makes no sense to declare the *Faragher-Ellerth* affirmative defense unavailable and to impose strict liability on the employer.

If this Court concludes that a constructive discharge is a tangible employment action, judicial inconsistency in the area of sexual harassment law is inevitable. Constructive discharge law is not an appropriate substitute for the clear standards set forth in the *Faragher-Ellerth* defense. Because constructive discharge law incorporates only a standard of reasonableness, which may or may not require notice by the employee before resigning, the law is necessarily in a state of flux, with results depending less on the law and more on the particular sympathies of each case.

If a constructive discharge is viewed as a tangible employment action, an employee may have a more valuable claim by resigning, rather than by remaining employed. The employer community is concerned that if the Third Circuit's approach is widely followed, a perverse incentive will be created to encourage employees to resign without providing notice of the potentially offending conduct, thereby impeding an employer's ability to remedy the situation and to prevent its recurrence.

STATEMENT OF THE CASE

This case presents an important issue under Title VII: whether a constructive discharge is a tangible employment action that deprives an employer of the *Faragher-Ellerth* affirmative defense. It is an issue that currently divides the courts of appeals, and is of significance to employers nationwide.

On or about March 23, 1998, respondent Nancy Suders began working as a police communications operator with the Pennsylvania State Police ("State Police"). Pet. App. 6a. Suders alleged that from the start of her employment, she

suffered sexual harassment so severe that she felt compelled to resign *only five months later*—on August 20, 1998. She named defendants Sergeant Eric D. Easton, Patrol Corporal William D. Baker, and Corporal Eric B. Prendergast as the principal offenders. *Id.*

Suders admittedly knew of the State Police's policy prohibiting sexual harassment, which was posted at her barracks and distributed to all employees. Pet. App. 79a. In June 1998, and as part of her training, Suders also attended a seminar on sexual harassment led by the State Police's equal employment officer, Virginia Smith-Elliot. Pet. App. 10a. At that time, Suders told Smith-Elliot that she might need some help, but did not provide any details. *Id.* Smith-Elliot gave Suders her telephone number, but never heard from Suders until August 18, 1998, two days before her resignation. *Id.* at 10a-11a.

On August 18, Suders contacted Smith-Elliot and told her that she was being harassed.[4] According to Suders, Smith-Elliot told her to fill out a complaint form, but did not tell her where to obtain the form. According to Smith-Elliot, however, she promised to send Suders the complaint form. Pet. App. 11a.

Two days after her conversation with Smith-Elliot, Suders resigned. The precipitating cause appears to have been an incident relating to scores she received on a computer skills test. Pet. App. 11a-12a. Suders' supervisors had told her that she repeatedly failed the computer skills test, but Suders had not seen her actual scores. In an effort to find the test results, she went through a drawer in the women's locker room. She found the test papers and removed them. *Id.* Once it was discovered that these papers were missing, officers dusted the

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[4] According to Smith-Elliot, Suders did not complain of sexual harassment, but complained only of age and political affiliation discrimination. Pet. App. 11a.

drawer with theft detection powder. On August 20, 1998, Suders went back into the drawer, allegedly to return the test papers, but the powder turned her hands blue. *Id.* When confronted, she told Corporal Baker that she was resigning. Suders claimed that she was then treated as a suspect, and was handcuffed, photographed, and questioned. Suders then turned in a letter of resignation that she had been carrying with her, and eventually was permitted to leave. *Id.*

Suders thereafter filed suit, alleging violations of Title VII; the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 *et seq.* After the parties completed discovery, the State Police moved for summary judgment. Pet. App. 13a.

The district court granted the motion for summary judgment in its entirety. Pet. App. 62a-82a. With respect to Suders' sexual harassment claim, the district court held that issues of fact existed as to whether Suders had been subject to a hostile work environment. The court held, however, that the State Police had established an affirmative defense to vicarious liability for the actions of its supervisors. *Id.* at 80a. The court found it dispositive that Suders did not give the State Police any meaningful time to respond to her complaints. In the court's words (*id.*),

> Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment.

On appeal, the Third Circuit concluded that the district court erred in two respects. First, the panel held, summary judgment was inappropriate because a material dispute of fact

existed as to whether the State Police exercised reasonable care to prevent or correct the sexual harassment that Suders allegedly suffered. Pet. App. 20a. Neither the State Police nor the Chamber challenge this aspect of the appeals court's holding.

Although the court of appeals could have ended its discussion at this point, the court turned to what it stated was the critical issue: whether a constructive discharge, when proved, constitutes a tangible employment action. Pet. App. 28a.

The court acknowledged the existence of a square conflict among the circuits on this issue. Pet. App. 39a-41a. It noted that the Second and Sixth Circuits have held that a constructive discharge does not constitute a tangible employment action, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Turner v. Dowbrands Inc.*, 2000 WL 924599 (6th Cir. 2000) (unpublished), whereas the Eighth Circuit has reached the opposite conclusion. *Jaros v. LodgeNet Entertainment Corp.* 294 F.3d 960, 966 (8th Cir. 2020); *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001).

Rejecting the reasoning set forth by the Second and Sixth Circuits, the court of appeals held that a constructive discharge does constitute a tangible employment action under *Faragher* and *Ellerth*. According to the court, when a constructive discharge is proven, the trier of fact may not consider the employer's *Faragher-Ellerth* affirmative defense, but instead must hold the employer strictly liable—irrespective of whether any notice of the underlying misconduct had been provided to the employer, or whether the plaintiff by invoking the internal complaint procedure effectively and promptly could have put a halt to the offending conduct. Pet. App. 57a.

SUMMARY OF ARGUMENT

Under *Faragher* and *Ellerth*, a constructive discharge does not constitute a "tangible employment action" for which the employer is automatically held vicariously liable for the acts of its supervisors.

A constructive discharge, by its nature, is not the sort of "official company act," *Ellerth*, 524 U.S. at 762, for which this Court has deemed it appropriate to hold an employer strictly liable. Unless an employee reports conduct to the employer, the employer will not have an opportunity to investigate, to correct the problem, and to provide an effective remedy to the victim.

An important policy underlying both *Faragher* and *Ellerth* is that employers should encourage employees to report harassing conduct by a supervisor, and the method of encouragement selected by the Court is a rule of contingent liability for the employer. Accordingly, the employer is afforded an affirmative defense to vicarious liability when the supervisor's harassment does not culminate in a tangible employment action—*i.e.*, an "official company act" that the employer could detect even in the absence of a complaint by the affected employee.

To equate a constructive discharge with an actual termination for *Faragher-Ellerth* purposes, as the court of appeals has done, distorts well-established understandings of constructive discharge doctrine. A constructive discharge is simply a legal construct for treating a resignation as a discharge for the limited purpose of allowing the plaintiff to argue that it should not be treated as a wholly voluntary act. A resignation remains, however, quite distinct from a tangible employment action for purposes of the *Faragher-Ellerth* defense. A resignation does not involve a company act that reasonably puts the employer on notice of a potential claim. Even where a resignation generates some documentation

under the employer's standard procedures, the mere fact of a resignation cannot be converted into an act of the company, and such an act is essential if strict liability is to be imposed.

To claim constructive discharge, an employee in most instances need not provide her employer with notice of sexual harassment prior to resigning. Whether or not a particular resignation should be treated as a constructive discharge depends entirely on a standard of reasonableness under all the circumstances. The court of appeals' decision provides no incentive for employees to report improper conduct well before quitting their employment.

The standards set forth in *Ellerth-Faragher* have had a positive influence on the business community and the environments in which employees work. The vast majority of businesses now have harassment policies, and progress continues. The court of appeals' ruling threatens that progress, and threatens as well the consistent procedural rules developed under *Ellerth* and *Faragher* that have served to encourage employers to make substantial investments in harassment training and prevention.

ARGUMENT

A. Treating a Constructive Discharge as an Occasion for Strict Employer Liability Undermines the Critical Behavioral Incentives this Court Fashioned in *Faragher* and *Ellerth*.

In *Faragher* and *Ellerth*, the Court confronted the question of which standard of liability should be imposed on employers when their supervisors engage in unlawful harassment. The spectrum of liability ranged from simple negligence (the standard governing co-worker harassment) to strict or "automatic" vicarious liability. To promote Title VII policies encouraging both employer internal compliance with anti-harassment mandates and claimant minimization of harm (by

invoking available, effective internal procedures), the Court recognized that, save for "tangible employment actions," employer liability should be conditional, subject to an affirmative defense. The circuits recognizing a constructive discharge exception to this framework threaten to unravel the beneficial incentives for transforming workplace culture that this Court provided in *Faragher* and *Ellerth*.

1. *Faragher* and *Ellerth* Implicitly Rejected Constructive Discharge as a Tangible Employment Action

This Court did not address specifically in *Faragher* and *Ellerth* whether constructive discharge is a tangible employment action. But that is not the full story. The plaintiff in *Ellerth* alleged, and this Court had before it, a claim of constructive discharge. *Ellerth*, 524 U.S. at 749. Despite this claim, the *Ellerth* and *Faragher* decisions did not include "constructive discharge" as one of the enumerated examples of tangible employment actions. *See Ellerth,* 524 U.S. at 761 (describing tangible employment actions as those that "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

It is not surprising that, in the aftermath of the *Ellerth* and *Faragher* decisions, this Court's omission of constructive discharge in its discussion of tangible employment actions was widely regarded as a purposeful one. *See, e.g.*, *Caridad v. Metro-North Commuter R.R.*, 191 F. 3d 283, 283 (2d Cir. 1999) ("the facts of *Ellerth* . . . indicate that constructive discharge is not a tangible employment action"); *Shoiber v. Elmro*, 1999 WL 825275, at *5 (N.D. Ill. Sept. 21, 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1019 (S.D. Ohio 1999); *Desmarteau v. City of Wichita*, 64 F. Supp. 2d 1067, 1079 (D. Kan. 1999)(claims that constructive discharge is a

tangible employment action "dispelled by the [*Ellerth*] case in which the plaintiff alleged that she had been constructively discharged."). That is, this Court could have included, but chose not to include, constructive discharge as a species of tangible employment action.

Based on a review of *Ellerth*'s procedural history, the court of appeals observed that this Court was not asked to decide any question regarding constructive discharge, and, on that basis, the court dismissed any suggestion that *Ellerth* provides guidance on whether a constructive discharge can constitute a tangible employment action that would deprive an employer of the *Ellerth-Faragher* affirmative defense. Pet. App. 47a-48a. The court of appeals, however, has taken too cramped a view of the decision and reasoning in *Ellerth*.

It is not merely that this Court did not include constructive discharge in its list of examples of tangible employment actions. The Court also allowed Burlington, the defendant in *Ellerth*, to assert its affirmative defense on remand—even in light of plaintiff's constructive discharge claim. *Ellerth*, 524 U.S. at 766. In remanding, this Court concluded that, "*[a]lthough Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik*, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." *Id.* (emphasis added). In fact, the very question presented in *Ellerth* presupposes, properly so, that constructive discharge is *not* a tangible employment action. *Id.* at 747 ("[w]e decide whether . . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, *yet suffers no adverse, tangible job consequences. . .*").

The court of appeals therefore was too quick to conclude that *Ellerth* offers nothing instructive for the present case. Pet. App. 48a. But even putting aside the specific allegations by the plaintiff in *Ellerth*, and the terms of this Court's remand, the rationale for imposing strict employer liability in the context of tangible employment actions simply does not extend to constructive discharge.

2. A Constructive Discharge Is Not "An Official Act of the Enterprise" Under *Faragher* and *Ellerth.*

Constructive discharge is not "an official act of the enterprise" that should preclude assertion of the *Ellerth-Faragher* defense. By their very nature, tangible employment actions involve "an official act of the enterprise," *Ellerth*, 524 U.S. at 762, which, in most cases, "inflicts direct economic harm." *Id.* As stated above, such actions must "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Although the examples provided by the Court of tangible employment actions were not exhaustive, they all involved an *act* by the employer as an entity, an act that the Court decided the employer should not be permitted to seek to excuse through the *Ellerth-Faragher* affirmative defense. Constructive discharge involves no such act; it merely provides a basis for an employee to avoid the otherwise voluntary character of a decision to resign.

The rationale for holding an employer strictly liable when a supervisor's harassment culminates in discharge, demotion, or other tangible employment action is that the supervisor, by taking such action, becomes the employer's "proxy": "he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790. Additionally, because

a tangible employment action is an "official company act," *Ellerth*, 524 U.S. at 762, the Court concluded that the employer, in most cases, has the opportunity to review and evaluate the supervisor's action after the fact:

> A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Ellerth, 524 U.S. at 762. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes."). The underlying policy judgment is that unconditional strict liability for harassment culminating in a tangible employment action will provide employers with a greater incentive to review and to monitor their supervisors' official decisions and actions.

This policy judgment is inapposite when an employee resigns, and later alleges a constructive discharge. What is missing is the "official company act"—an action that is documented and subject to review by higher management. Because the employee ultimately controls the decision whether and when to resign, and reasons need not be given (and ordinarily are not required as a prerequisite for later claiming a constructive discharge), the resignation may come as a complete surprise to the employer. A resignation simply does not afford the employer sufficient opportunity to react and remedy a problem. It does not put the enterprise on notice that the circumstances occasioning the resignation may involve supervisory misconduct. Indeed, only a rule that treats constructive discharge claims as subject to the *Faragher-Ellerth* defense creates an incentive for the claimant to put the employer on such notice.

For this reason, the court of appeals' stated rationale—to "effectively encourage employers to be watchful of sexual harassment in their workplaces and to remedy complaints at their earliest possible moment"—does not withstand scrutiny. Pet. App. 56a. An employer cannot remedy those complaints that it does not know exist, and it cannot investigate allegations that are not brought to its attention.

3. The Concept of Constructive Discharge Serves Only to Supply One Element of the Plaintiff's Prima Facie Case. It Has No Bearing in Determining Those Occasions Warranting Strict Employer Liability.

To assert a claim under Title VII, a plaintiff must demonstrate an "adverse employment action." Pet. App. 3a n.1. This is a necessary element of a prima facie case under Title VII. *Id.*

A person who voluntarily resigns from employment has not, on the face of things, suffered an adverse employment action, and therefore has no cause of action under Title VII. A constructive discharge, however, if proven, permits a plaintiff to transform a non-actionable event—a resignation—into a potentially viable claim. Thus, a constructive discharge serves the limited purpose of supplying plaintiff with one element of the prima facie burden. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("When a constructive discharge is found, an employee's resignation is treated—*for the purpose of establishing a prima facie case* of employment discrimination—as if the employer had actually discharged the employee.") (emphasis added).

As the court of appeals itself recognized in this case, the concept of a tangible employment action under *Faragher* and *Ellerth* is distinct from, and narrower than, that of an adverse employment action. Pet. App. 3a n.1 ("we understand a tangible employment action as being a narrower, more

restricted category of actions occurring in the workplace"). Despite this acknowledgement, however, the court of appeals effectively ended its analysis with the conclusory judgment that a constructive discharge is the functional equivalent of a termination. *See id.* at 50a, 54a ("[i]n the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship.") The court failed to consider that, in reality, the employee and employer play very different roles when an employee resigns, as opposed to when an employer effects a discharge.

As described above, *Ellerth* made clear that "a tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." 524 U.S. at 762. The company also may have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.").

Where an employee resigns, however, higher level management typically has no opportunity to weigh in on the employee's decision. The act of resignation is inherently ambiguous. There are many reasons that employees quit that have nothing to do with the employment relationship. As mentioned, employees do not always give reasons, nor is the giving of reasons always required. Absent a rule effectively requiring the provision of notice to the employer—a rule suggested by *Faragher* and *Ellerth* but rejected by the panel below—an employer may have no reason to suspect that misconduct of any kind prompted the resignation.

Under these circumstances, strict liability is not the appropriate legal standard. It is the resigning employee, not the employer, who has "acted." Of course, a plaintiff may pursue a Title VII claim via a constructive discharge theory even

where no notice to the employer has occurred. But the employer should not be foreclosed, in these circumstances from demonstrating that the *Faragher-Ellerth* defense is meritorious on the facts.

In short, except in cases where the claim arises from one or more "official act[s] of the enterprise," *Ellerth*, 524 U.S. at 762, the *Faragher-Ellerth* affirmative defense holds employers to the correct standard. Employers are called to account when they turn a blind eye towards an employee complaint, and, conversely, they should be able to avoid strict liability if they take seriously their internal compliance duties by investigating and remedying claimed misconduct brought to their attention and the claimant has unreasonably failed to utilize these procedures.

B. Excluding Constructive Discharge Claims from the *Ellerth-Faragher* Defense Undermines Uniformity in Employment Discrimination Claims.

The business community has responded vigorously to recent developments in the law governing sexual harassment claims and, in particular, to this Court's decisions in *Faragher* and *Ellerth*. A large majority of employers (97 percent of those responding in one survey) reported that they have written policies against sexual harassment. Similarly, most employers have established formal investigatory procedures for responding to sexual harassment complaints, and large numbers of employers (62 percent of those responding in the same survey) provide sexual harassment prevention training. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003). Although these measures, of course, cannot guarantee that all harassing conduct will be eliminated from the workplace, they have begun to break the culture of overlooking or tolerating such wrongdoing.

The impact of this Court's rulings in *Ellerth* and *Faragher* has its own lesson: employers seek specific and consistent guidelines with regard to harassment response and prevention. That consistency is now threatened: excepting constructive discharge from the *Ellerth-Faragher* defense undercuts the incentives driving the business community's recent progress in creating and enforcing policies against harassment.

The court of appeals' ruling here would chill further progress in this area. Although the court confidently predicts that the reasonableness test embodied in constructive discharge law will stymie any incentive for irresponsible behavior on the part of victimized employees (Pet. App. 56a-57a), that prediction almost certainly is overly optimistic. Constructive discharge law lacks the consistency of result that would be needed to support the court of appeals' reasoning on this point.

As the court of appeals acknowledged, there are important intersections between constructive discharge law and the *Ellerth-Faragher* defense. Pet. App. 58a. Specifically, the two share similar, but nevertheless different, "reasonableness" standards under which a jury can review both the employee's and the employer's conduct. This similarity leads to confusion. To accommodate these similar but different reasonableness standards under *Ellerth-Faragher* and constructive discharge law, the lower courts that have held that a constructive discharge constitutes a tangible employment action have created *ad hoc* rules regarding constructive discharge to account implicitly for the to *Ellerth-Faragher* defense. *See, e.g., Jones v. U.S.A. Petroleum Corp.*, 20 F. Supp. 2d 1379 (S.D. Ga. 1998) (finding constructive discharge to be a tangible employment action and simultaneously creating additional requirements for proof

of constructive discharge). This results-based decision-making—often on a case-by-case basis—provides no consistent guidance to the business community.

In addition, depending on the state of constructive discharge law in a particular jurisdiction, legal inconsistency necessarily will occur. Different burdens will be placed on plaintiffs, depending on the jurisdiction, and not the facts. For example, a plaintiff in one jurisdiction who alleges constructive discharge may not be able to prevail on her claim without establishing that notice was given to the employer before resigning. A plaintiff in another forum may not have a similar burden. *Compare Gawley v. Indiana Univ.*, 276 F.3d 301, 315 (7th Cir. 2001) (rejecting constructive discharge claim because "quitting was not the only option available to [the plaintiff] because of the university's procedures for victims of harassment."); *Woods v. Delta Beverage Group Inc.*, 274 F.3d 295, 301 (5th Cir. 2001) (rejecting constructive discharge claim because reasonable person would not have felt compelled to resign; reasonable person would have felt compelled to complain); *with Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747 (3d Cir. 1990) ("notice is not always required to sustain a case of constructive discharge.").

In short, allowing the *Ellerth-Faragher* defense to proceed in constructive discharge settings furthers the salutary employment incentives of this Court, and ensures consistency and continued progress in the area of harassment prevention and training.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 20, 2004